IN THE SUPREME COURT OF NEW ZEALAND SC 98/2009

BETWEEN **GREYMOUTH GAS KAIMIRO LIMITED**
GREYMOUTH GAS PARAHAKI LIMITED
GREYMOUTH GAS TURANGI LIMITED
GREYMOUTH PETROLEUM TURANGI LIMITED
First Appellants

AND **SWIFT ENERGY NEW ZEALAND LIMITED**
Second Appellant

AND **GXL ROYALTIES LIMITED**
Respondent

Hearing: 24 March 2010

Court: Blanchard J
McGrath J
Wilson J

Appearances: M D O'Brien with B S Clarke for the First Appellant
G M G Joe for the Second Appellant
J S Kos QC with S Jerebine for the Respondent

LEAVE HEARING

MR O'BRIEN:

Yes, if Your Honours please, O'Brien for the first appellants with my learned junior Mr Clarke.

BLANCHARD J:

Yes, thank you Mr O'Brien.

MR JOE:

Yes, may it please the Court, counsel's name is Joe for the second appellant.

BLANCHARD J:

Yes, thank you Mr Joe.

MR KOS QC:

If Your Honours please, I appear for the respondent, with my friend Ms Jerebine.

BLANCHARD J:

Yes, thank you Mr Kos. Yes Mr O'Brien.

MR O'BRIEN:

Thank you Sir. Your Honours will have seen from the papers that there are two grounds on which the application is advanced. First, that it's of a matter of general commercial significance and second because there is, or could be, a substantial miscarriage of justice –

BLANCHARD J:

I think we're more interested in arguability.

MR O'BRIEN:

Right Sir, thank you.

McGRATH J:

For my part Mr O'Brien, I'm interested in trying to clarify what I understand the Court of Appeal to be saying was an agreement between counsel as to what the provision meant. There was a passage in the judgment that I could not quite reconcile with what you were saying in your submissions in support of the application.

MR O'BRIEN:

Yes and would Your Honour be referring to the passage to the effect that both parties preceded on the basis that this was not a general consent clause, allowing refusal of consent for any reason but that it would have to be confined to the financial?

McGRATH J:

That's what I understood them to be saying. I couldn't quite square that with what you were saying in your argument?

MR O'BRIEN:

Right Sir. Yes, that is –

McGRATH J:

Where was the passage again?

MR O'BRIEN:

My friend says 33 Your Honour. Essentially, GXL, through counsel in both the High Court and the Court of Appeal but particularly the Court of Appeal, has said consistently that the only basis on which consent was withheld here was financial. They say a lack financial information, or sufficient financial information but essentially it's a lack of financial, demonstrable financial adequacy. There is a view that the clause could be read as a general consent clause, allowing the consentor, GXL, to take account of other matters. GXL, as plaintiff and counterclaim defendant and importantly, in the latter context, has effectively conceded that it will not read the clause that way and it will confine it to this specific and secondly, that it never has had any other reason for declining consent. That approach, or indeed concession, was accepted essentially by me Sir.

McGRATH J:

Right. The Court of Appeal says, we didn't, says somewhere doesn't it, we didn't necessarily read it that way?

MR O'BRIEN:

Yes, that's in 33 too and indeed Sir, one might not read it that way. One could read it as a general consent clause –

BLANCHARD J:

But your consent that we do read it that way?

MR O'BRIEN:

I accept what I see as a concession by GXL, yes Your Honour.

McGRATH J:

Well that's clarified that point for me, thanks.

MR O'BRIEN:

Thank you Sir.

WILSON J:

Mr O'Brien, in your argument, does the inclusion in the clause of the word "unreasonably" change its meaning from what it otherwise would be?

MR O'BRIEN:

Yes, it does Your Honour. It changes, in my submission, the approach that a Court or a contracting party ought to take in considering whether the prerequisites of the clause have been fulfilled. The Court of Appeal judgment, in my submission, makes no allowance for it essentially. The Court of Appeal judgment and the approach that the Court, with respect, has taken could just as easily be taken if the word "unreasonable" were dropped from the clause.

WILSON J:

That's what I understood your submissions and I'm still grasping for the explanation. I'm sure it's obvious as to how it can be said that there's common ground as to the meaning of the clause, given that your position is as you just stated it.

MR O'BRIEN:

The grounds Sir probably, the common ground is probably not as expansive as the Court of Appeal, with respect, might have described it. For example, in 33, the Court says, "Once it's accepted that financial capability objectively assessed will decide consent," this is in the middle of the passage, "...then collateral purpose can have no relevance." Well that, just to be clear, certainly was not accepted by the now appellants –

WILSON J:

I think this is Justice McGrath's point.

McGRATH J:

Mhm.

MR O'BRIEN:

That was not, no and I don't think there's any suggestion, unless my friend says otherwise, that that was ever accepted. The parties came at it from quite different directions. The now respondent, plaintiff but more importantly counterclaim defendant, says this is a case about whether Greymouth and Swift have provided adequate financial information and that's all it's about. Greymouth and Swift say no, no, no, that's your case, that's your case's plaintiff, our case as defendants and our case more importantly as counter claimers, is that you have withheld consent unreasonably, so the entire case is focused on the question of reasonableness, not on the question, our case, is not focused on the question of whether sufficient information has been given and there's an important distinction.

The other very important point Your Honours, is that it has always been contended on behalf of Greymouth and Swift that the proper approach to consent clauses is the approach we see in the lease cases and they're very common and there's many of them and much authority, to the effect that the approach should start, or that the approach is a two stage enquiry. First, what were the counter parties actual reasons for withholding consent and that is a subjective enquiry. Second, were those reasons reasonable and that approach is readily apparent in the *Lovelock v Margo* [1963] 2 QB 786 which we've put into the bundle and also in the *Bromley Park Garden Estates Ltd v Moss* [1982] 1 WLR 1019, [1982] 2 All ER 890 which is the second case in the bundle and in particular I would refer Your Honours to the judgment of Slade LJ which is the third judgment –

McGRATH J:

Perhaps you should just take us to that because we now maybe getting into the arguability point that the preceding judge has raised?

BLANCHARD J:

Well, I'm still puzzled about how it is said that unreasonably factors in. If Greymouth establishes that it has sufficient financial capability to meet the obligations, then is it being said that nevertheless a consent could reasonably be withheld?

MR O'BRIEN:

No Sir.

McGRATH J:

Well isn't it just a straight objective test then?

MR O'BRIEN:

Well that's the approach the Court of Appeal took Your Honour and it is possible, one must acknowledge that that is a possible approach but in my submission, it's not the approach that the authorities demonstrate is taken. Now, my submission is that those authorities are quite clear and you start with

the subjective enquiry and come to the objective secondly and why is that important? Well, two reasons because if the counterparty, i.e. the party from whom consent is sought, has no particular interest, in this case, financial interest and that's the allegation essentially here but they have some other reason for withholding, then they're acting outside the clause, unreasonably and in breach and, very important, the second reason is also important Your Honour. The case has established quite clearly that in these situations the would be assignor, or seller, seeking consent and the proposed buyer, or assignee, are entitled, if there has been an unreasonable withholding, to proceed to complete their transaction. That is to say they're released from the fetter of the restriction because of the breach, i.e. the unreasonable withholding and they can complete –

BLANCHARD J:

Yes but that's a risk you take if you go ahead.

MR O'BRIEN:

Yes indeed, Your Honour but having gone ahead –

BLANCHARD J:

That's familiar enough.

MR O'BRIEN:

Yes.

BLANCHARD J:

But, assume that the party being asked to consent had an improper motivation and it acted on that improper motive and refused consent but in actual fact, the assignee was insolvent. Is it being suggested that the consent couldn't because of the improper motive, be withheld?

MR O'BRIEN:

That is the situation in extremis and –

BLANCHARD J:

Well, one has to look at where arguments lead.

MR O'BRIEN:

Yes, Your Honour and on the authorities, my submission is that that is possible and indeed –

BLANCHARD J:

That sounds to me like a completely impossible argument.

MR O'BRIEN:

Let me put it, let me reverse it slightly –

BLANCHARD J:

I mean, we're going to look at the authorities but I have to say that I find that very strange.

MR O'BRIEN:

In my submissions Sir, I don't need to go that far and have never wanted to go that far and the Court of Appeal has put it to us –

BLANCHARD J:

Not in the particular case but we must look at the matter as any decision would apply to other situations.

MR O'BRIEN:

Yes, I understand, of course, of course, Sir. Equally, one might say well, the reverse of that is you could have a consentor, let's say a landlord, who cares not a whittle, not a whit about the financial position of the incoming tenant because they, ah because, for whatever reason they may have and they simply want to keep that particular party out, is that reasonable? In my submission, no it's most certainly not reasonable and then, when the assignee and the assignor decide to whether to exercise their self help remedy and of course they might not see –

BLANCHARD J:

But they would only care not a whit, as you put it, if they were in fact of the belief that they were dealing with somebody who was solvent.

MR O'BRIEN:

Possibly Sir, or they possibly might –

BLANCHARD J:

I mean, any other reaction would be completely irrational.

MR O'BRIEN:

Well, with respect Sir, they may have other reasons for opposing and as is alleged here, the allegation in this case, in the counterclaim, was simply that GXL is acting, not because of concerns, albeit stated concerns, about financial position of GXL but for other collateral reasons which have nothing whatsoever to do with what it is entitled to withhold consent for. So, yes, at an absolute extreme one might say that the argument would take one to the place Your Honour's mentioned but that is an extremis and one could readily build into tests some protection.

So for example, unless it was abundantly obvious that the assignee had no financial standing whatsoever but there will be, as His Honour Dobson J put it, many cases where it could be marginal and the reasons that the counterparties had for withholding consent will be most relevant. In any event Your Honour, I still come back to, there's a long line of authority, albeit in the lease cases which say this is the approach and with respect, people rely on that as a line of authority and they have to because –

BLANCHARD J:

All right, well you should take us to those cases.

WILSON J:

Just before you do so, I still trying to grasp, for the point, can I put the question to you this way, on your argument, is the right to withhold consent narrowed by the obligation not to withhold unreasonably, or does it make no difference that the word unreasonably is there?

MR O'BRIEN:

It's narrowed. It makes a big difference that it's there.

WILSON J:

Can you articulate that difference for me please?

MR O'BRIEN:

Yes. If it weren't there, it would be a purely objective test and one would look simply at the question of financial position. As the Court of Appeal has said, it then really becomes, the onus becomes on the assignee to establish financial position. With the introduction of the word unreasonable into the test, the question, the scope of the counterparty, or the counterparty's ability to refuse as confine, not just to the financial but also to acting reasonably, can't have regard to anything else, must not have regard to anything else and must within all four corners of the test be acting reasonably –

WILSON J:

So your requirement –

MR O'BRIEN:

Yes Your Honour.

WILSON J:

– one, to establish absence of financial capability and then a super added obligation, is it –

MR O'BRIEN:

Yes, yes.

WILSON J:

– beyond that, not to act unreasonably?

MR O'BRIEN:

Yes.

BLANCHARD J:

But you were rather putting it that you looked at the reasonableness first before you got to the financial capacity?

MR O'BRIEN:

The cases say that one looks at the reason first and subjective test, what were the reasons of the counterparty for refusing and secondly, were those reasons reasonable. That then is the objective part of the test. Many of the cases of course Your Honours, especially in the lease cases, are general consent clauses by which I mean they are clauses which say –

BLANCHARD J:

Well, they're not going to help.

MR O'BRIEN:

Well with respect – help me Sir? Well, they're of limited application but in my submission they are of application. Many of the cases are like that but many aren't but my submission about that is that actually they do help because the criteria, although not specified, are nevertheless limited. So in a lease case, it's not possible for a landlord with a general consent clause like that to take account of any matter. There are limits and the limits are created by the purpose of the contract and the purpose of the clause and generally, the cases say, will be confined to questions of personality of proposed lessee and use, likely use by proposed lessee. So, even though the clauses are general, they are in fact limited and secondly, it is possible to identify the criteria. Here, we have specific criteria or a specific criterion but that's not, in my submission, so unusual. So for example, in the *WEL Energy Group Ltd v*

Electricity Corporation of New Zealand (ECNZ) [2001] 2 NZLR 1 which is also in the bundle, there was what appeared to be a general consent clause, it didn't specify any criteria Your Honour but McGechan J found that the criterion was credit worthiness. So, whilst it wasn't expressed, it was implicit and identifiable from a proper interpretation and construction of the contract.

There are other cases where similar conclusions have been reached by the Courts, so whilst it appears general, they aren't in fact so general as might appear and in many cases the criteria are very limited and in some cases effectively a single criterion. So this case, in my submission, is not so different which in my submission means that this case, fully developed, is of general application to all of these consent clauses and this Court and indeed the Court of Appeal, apart from this case, hasn't really addressed how the clauses work or how they are to be approached, or most importantly, how they're to be approached when a party has acted to transfer, i.e. has adopted the self help remedy. In which case a degree of certainty in the law is, in my submission, clearly desirable. The Court of Appeal –

BLANCHARD J:

I don't think you need to argue whether –

MR O'BRIEN:

Thank you, Your Honour.

BLANCHARD J:

– whether you meet the criteria –

MR O'BRIEN:

It's just arguability then, thank you.

BLANCHARD J:

– the doubts that we've had have been about arguability.

McGRATH J:

Right, are you going to take us to the cases?

MR O'BRIEN:

I will Your Honour. Might I start though at paragraph 13 of the judgment, indeed, paragraph 10, where the Court notes the respondent's submission, second paragraph, "What is required is a two stage enquiry. First, what was the actual reason for GXL refusing consent to a subjective/this objective enquiry and secondly whether the reason was a reasonable and objective enquiry and then if I ask Your Honours then to turn to paragraph 13 there is there a list of authorities and all of those cases, down to the middle of the paragraph, support that proposition. They also support the proposition that a collateral purpose is necessarily unreasonable and the second two cases mentioned there, *British Gas Trading Ltd v Eastern Electricity Plc* [1996] EWCA 2205 and *WEL Energy* as you'll see are authority for the proposition that those lease cases mentioned above do have application to general commercial contract consent provisions. Those are some of the cases, principles well established. If I could then take you to –

WILSON J:

Mr O'Brien, which of the cases do you say establish the principle that a collateral reason is unreasonable?

MR O'BRIEN:

I think all of them do actually Your Honour. Certainly *Bromley Park* and I believe from memory *Toll Bench Ltd v Plymouth City Council* (1988) 56 P & CR 194, [1988] 1 EGLR 79, *Louis Vuitton New Zealand Ltd v Princes Wharf Property Fund Ltd* (2005) 5 NZ ConvC 194,073, (2004) 5 NZCPR 801, [2005] ANZ ConvR 244 (extract) all mention it. *Louis Vuitton* doesn't support what my friend says but certainly *Bromley Park* does and if one looks at the text, leading text in English, Woodfall, which was mentioned in paragraph 11 of the judgment, that lists a number of cases which also support the proposition and indeed the paragraph or the passage quoted from Woodfall there is also important and in itself supports the proposition.

McGRATH J:

If you can just take us to perhaps a key passage in whichever it is –

MR O'BRIEN:

I'll take you to *Bromley Park* Your Honour which is tab 2 in my bundle and just by way of introduction this was a lease case as Your Honours will see from the head notes, as good a place as any, where the tenant sought permission to assign, it was refused. She and the would be assignee thought it was refused unreasonably and proceeded to assign to Mr Moss who was the defendant. The consent provision was of a general type and that's apparent from page 1023, line C, by section 19 of the Landlord Tenant Act, the covenant in the lease and that is the covenant not to assign without consent is deemed to be subject to a proviso to the effect that such licence or consent is not to be unreasonably withheld. So a general consent provision and then Sir if I could take you to the judgment of, just by way of example, Slade LJ at page 1033, line F. "It is well settled that a tenant holding –" shall I allow Your Honours to read that and then I'll refer you to another passage?

BLANCHARD J:

Yes, thank you.

MR O'BRIEN:

And on a collateral, I'll just jump around a bit, but on the collateral purpose point if I could take you to page 1035, the paragraph beginning between line B and line C, where it says, "A landlord is not in my judgment –" et cetera. And might I also take Your Honours back and refer you to page 1034, the passage just beginning above line E where it says, "It seems to me clear that insofar as the landlords are allowed to rely on reasons which were not stated, they can only be permitted to rely on reasons which did actually influence their minds at the relevant date."

McGRATH J:

That's the earlier case you've give us, *Lovelock* –

MR O'BRIEN:

Yes it is and it's in the bundle and *Lovelock* is a decision of Lord Denning I think. And if I might refer you to a passage in the *Lovelock* case and I might say Your Honours that Slade LJ judgment there is not in substance different than the others, it's just a convenient reference point. The *Lovelock* case, which is tab 1, could I refer Your Honours to page 789? This was another lease – actually before we leave *Bromley Park*, might I, a slight diversion because it doesn't fully support my point, but it seems apparent from this case and the judgment of Cumming-Bruce LJ that indeed there may have been some doubt about Mr Moss' financial position, nothing more, but some doubt about it. He was a barrister but perhaps a struggling barrister, not unheard of –

BLANCHARD J:

Was this Gabriel Moss?

MR O'BRIEN:

One doubts Sir.

BLANCHARD J:

Peter.

MR O'BRIEN:

Surely not Gabriel Moss but –

BLANCHARD J:

No, it was Peter Moss.

MR O'BRIEN:

But at page 1032, line B, the Court there is dealing with two matters which it said were peripheral and Cumming-Bruce LJ says there, "The Judge rightly regarded this as a peripheral matter –" and it's a matter of no importance for this case, " – which did not assist." And then he goes on, "He took the same

view of the plaintiffs' attempt to fall back on the assignee's financial position first disclosed by the defendant when he gave evidence candidly of his financial position and prospects when he was in the witness box. As the Judge said, there is no hard evidence." Now it's not by any means clear but it seems there was some doubt but the point for the Court there was it doesn't really matter because it's not the reason the landlord had in mind at the time. Even though quite clearly it would be an acceptable criteria on which to base a consent.

If I might take you then to *Lovelock v Margo*, page 788, but actually the best passage is probably on 789 and before I take you to it might I just explain very briefly the facts, again landlord, tenant. Landlord refused purportedly on the basis that there was some dispute over the area of the tenancy being assigned but in fact underlying that the landlord had a different motivation which emerged during the trial of the matter and Lord Denning dealt with matters essentially in the final paragraph on 789 noting at the beginning that landlord's counsel sought to argue this as an objective question i.e. wanted to bring in matters which would have been permitted under a consideration and it's simply an objective test and His Lordship said, no it is not. That's all of that passage really carrying over to the next page.

BLANCHARD J:

She put forward a bad ground and she has not shown any other ground before the Court.

MR O'BRIEN:

Yes.

BLANCHARD J:

Which suggests that the bad ground would not in itself have been a disqualifying factor?

MR O'BRIEN:

Possibly not Your Honour, yes, correct.

BLANCHARD J:

Well how do you relate that to a situation where there is an objective criterion stipulated in the clause?

MR O'BRIEN:

With a little bit of difficulty Sir but my submission is there's always an objective criteria because it's always ascertainable by reference to the purpose of the contract so that's common, there will always be criteria. They might not be specified but they will be there as for example in *WEL* which I'll take you to in a moment.

BLANCHARD J:

But I don't see on the basis of what Lord Denning is saying that it's possible to argue that a collateral purpose on the part of GXL was disqualified if Greymouth objectively did not at the time have sufficient financial capability to meet the obligations under the permit and the deed.

MR O'BRIEN:

Well my submission Sir is either that it does disqualify, and I'll come back to it in a moment, or it is a factor which will influence the assessment of whether consent has been held reasonably or unreasonably so that if GXL indeed did have international purpose and did not have much care for Greymouth's financial position, which is the allegation, then that is a factor which will assist in determining whether it was acting reasonably or unreasonably and I know that those, that that particular sentence in Lord Denning's judgment is to the effect Your Honour said but equally he does say, "The matter cannot be considered without regard to the state of the mind of the landlord herself as to her reasons," and he goes on to say, "How otherwise can a lease hope to see whether he can assign unless he knows the landlord's reasons for objection." And we see the same point echoed 20-odd years later in the *Bromley Park* case and it is in other cases. How can one deciding whether to adopt

self-help remedy, make that decision unless there is some consideration of what reasons have been given or are held for refusing consent.

BLANCHARD J:

Are there any other cases you want to take us to, bearing in mind that we're not hearing full arguments?

MR O'BRIEN:

Yes Sir. Well I will take you to *WEL*, I've only put three cases in. I should say immediately Sir there are a number of other cases and then if I might take you –

BLANCHARD J:

But one can assume that they're not better than these?

MR O'BRIEN:

They don't make any different points and no they're not better Sir but they clearly show it's a well accepted approach. *WEL Energy Group v ECNZ* is a case of a different character to –

BLANCHARD J:

It came to the Court of Appeal. I wrote the judgment on appeal from this but I don't, I think it went on other grounds.

MR O'BRIEN:

I can only say I hope that's right Sir because I'm not aware of the Court of Appeal judgment I'm sorry.

BLANCHARD J:

Yes, it is the case, I remember the opening sentence of McGechan J judgment.

MR O'BRIEN:

It does catch.

BLANCHARD J:

It's reported. In fact this judgment of McGechan J is reported.

MR O'BRIEN:

Apologies Sir.

BLANCHARD J:

I think they're both reported together.

MR O'BRIEN:

And my friend says the Court of Appeal affirmed the judgment.

BLANCHARD J:

We did but I can't remember on what ground. It's a long time ago.

MR O'BRIEN:

Thank you Sir. Well Your Honour might recall that, assuming you don't because it is a long time ago, it was a case about hedge contracts, certainly not a lease case. There was a prohibition against, not against this, well there was a prohibition against assignment to the hedge contracts but more fundamentally for this purpose there was a prohibition against ECNZ disposing of its undertaking and the clause in question can be seen at paragraph 6 of the judgment and in particular it's clause 8.1.3(d). It's on page 3. So no criteria specified but His Honour found –

BLANCHARD J:

Wait a minute, what about 6.1?

MR O'BRIEN:

Yes, 6.1 did have criteria specified but 6.1's prohibition against assignment of the contracts without consent did specify criteria, that clause wasn't directly in issue although obviously it had an influence on the interpretation of clause 8.1.3(d) which was the clause in issue.

BLANCHARD J:

Mmm.

MR O'BRIEN:

And whilst this is just a submission if I could start, I'll just take Your Honours briefly through the judgment. Paragraph 20, His Honour begins summarising the submissions by WEL and I only need refer you to the first two sentences of A and in particular, well both but in the second down to where it says, "Consent is not to be withheld arbitrarily, capriciously or to capture some unrelated collateral advantage." His Honour goes on later in the case to refer – ah, in that paragraph to refer to *British Gas*, another case in 1996 English Court of Appeal which was another commercial case concerning withholding of consent where the lease case principles were adopted. There doesn't seem to be any argument in that case about it, indeed as I recall counsel agreed they should apply. And then His Honour makes, discussed his reasons beginning at paragraph 23 and he begins by looking at clause 8.1.3(d) and decides that the criterion for that clause is creditworthiness and that's apparent in the final sentence of paragraph – sorry, final two sentences of paragraph 26 and I just mention that because it's an example of what I was talking about before where assuming the general clause is actually just the single, single purpose criterion clause, and then if I might refer Your Honours to paragraph 31. Well 30 might be the place to start where His Honour says, well what area the implications of the drafting differences between 6.1 where specific criteria are identified and 8.1.3(d) where they are not. And I'll just let you read paragraph 31. And my point in taking Your Honours to that paragraph is that His Honour notes that, "The draftsman appears to be conscious of the rules prohibiting taking collateral advantage." So whilst His Honour in this case did not necessarily – did not expressly apply all of the lease case principles, he certainly had them put to him and he has worked with them and effectively adopted them and in my submission that supports the basic proposition that Greymouth and Swift have put in this case, that they should apply here. The *British Gas* case which I referred Your Honours to, which was in this judgment at paragraph, I gave Your Honours the reference,

paragraph 20, likewise does the same, just adopts all the lease case principles although if I recall without argument. Interestingly also appeared there to be a general consent clause but the Court took it as essentially a single purpose criterion clause i.e. was the proposed assignee of adequate standing. So it is somewhat difficult, I know, to necessarily apply those general consent clauses holus bolus to a case involving a single criterion but again my submission is well in fact they are limited. The criteria are limited and secondly, in any event, even with the single purpose clause, it will inevitably often be multi-dimensional as here. It's financial standing sure, but what aspect of it is it that GXL has objected to? Is it an alleged inadequacy of assets? Is it an alleged excess of liabilities? Is it cashflow? Is it concerns about the market? Is it concerns about prospects? What? So –

BLANCHARD J:

There presumably are pleadings though that will bring that question out?

MR O'BRIEN:

Well not really at the moment sir no it's more of a general question. In fact the allegation is simply that Greymouth and Swift haven't established Greymouth's financial position. The allegation in the counter-claim is that consent is being unreasonably withheld or withheld unreasonably. Why? One reason of course is the question here i.e. because they've been acting for collateral purpose. Now it's a serious allegation to make, or serious enough, but of course it wouldn't be made unless it were, unless there were some grounds for it and that's without suggesting, without arguing that now, it would be quite wrong to argue it now, but that is why in the bundle we have the case that came before Wild J arising out of the same facts being an application against, being an application to judicial review of the Minister of Energy's decision to consent to the assignment from Greymouth to Swift where His Honour essentially characterised GXL's case as, or approach as a spoiling tactic. Now that's under appeal so I shouldn't say much more about it. The Court of Appeal has heard that case just recently but we haven't got a judgment but in any event the point there is there is a reason, or thought to be reason, for the allegation and in any event in the normal course my

submission is that a counter-claim allegation like that ought to be allowed to run and the Court ought to decide with the benefit of the case fully developed and all of the evidence what the right approach should be and whether there's any substance to it.

BLANCHARD J:

Where do you want to go now?

MR O'BRIEN:

To the second ground if I might, substantial miscarriage of justice, although most of what I've said goes to that and I don't need to say much more about it. I don't –

BLANCHARD J:

I think you either persuade us that there's an arguable question of principle or you fail.

MR O'BRIEN:

Yes Sir, all right –

BLANCHARD J:

Substantial miscarriage of justice is never going to be the hook that you get leave on.

MR O'BRIEN:

No Sir. Well I wasn't going to press it as much as the first point because the first point is clearly better.

BLANCHARD J:

Well I suggest you don't press it at all.

MR O'BRIEN:

Right Sir but I nevertheless have to establish it's in the interests of justice to hear the appeal before the proceeding is concluded.

BLANCHARD J:

Well it's in the interest of justice to hear the appeal if there's an arguable point of general principle.

MR O'BRIEN:

Yes Sir. Well that's –

BLANCHARD J:

That's it.

MR O'BRIEN:

That was my point really Sir I think they all fold into the one.

BLANCHARD J:

Yes.

MR O'BRIEN:

I do have, I did put in an application for leave to adduce further evidence. My friend opposes. I'm not, I haven't addressed that yet but I will come to it shortly but just – well I'll come to it now. The point really there is it simply updates information which is –

BLANCHARD J:

How is it relevant?

MR O'BRIEN:

Well Sir first of all it's relevant to the question of justice, is it in the interests of justice that the case be heard now or dealt with later and the point really is there have been developments. There has been a mining permit granted, that's a matter of public record, there has been considerable –

BLANCHARD J:

I just don't see it has any relevance to the issue that we're concerned with.

McGRATH J:

Which relates to a particular point of time. I can understand why you made the application though.

BLANCHARD J:

I mean if you want to rely on that, go back to Swift, get a new assignment, and apply for consent again.

MR O'BRIEN:

There is some divergence in the authorities about the relevant date. Is it the date on which the transaction occurred, self-help remedy, or is it the date of the hearing of the Court so that's a somewhat unsettled point it seems although again it's addressed in the *Bromley Park* decision. But to sum up the submission, Your Honours, it is of general – the issue is of general significance for the reasons mentioned and it is arguable because the approach, we suggest, is, with respect, entirely orthodox on the lease cases. The question is, do they apply more generally? There is some support to say they do. His Honour McGechan J in the *WEL Energy* case, the English Court of Appeal in the *British Gas* case, although it wasn't fully argued, but the point would benefit from a review by this Court and it's important that people have the certainty that that review would give them particularly where they're exercising the self-help remedy. The Court of Appeal decision on the other hand, with respect, creates uncertainty because it takes an approach, albeit understandable perhaps, but nevertheless an approach which is out of kilter with decades of authority. I don't have anything more Your Honours unless you have questions?

BLANCHARD J:

No. Thank you Mr O'Brien that's been very helpful. Mr Joe, do you wish to address us?

MR JOE:

Just briefly Sir. I'm not proposing Your Honours to duplicate the efforts of my friends but I did want to say that we do support and adopt the submissions of the first appellant, I think that's set out in my friend's written submission to you.

BLANCHARD J:

Thank you. Mr Kos?

MR KOS QC:

If Your Honours please I propose to deal with the question of general commercial importance or significance and arguability together and the submission4 I wish to make to Your Honours is that the consent clause in the royalty deed is sui generis. It is not one that is a general application. Both in its own terms and as a consequence of the way in which the case has been conducted in the High Court and the Court of Appeal. Now the clause itself is found at the beginning of the Court of Appeal's judgment at paragraph 2 and it says there that, it says, "Swift is entitled to assign if it obtains the prior consent which consent shall not unreasonably be withheld where it is established that the purchaser, assignee or transferee has sufficient financial capability." Now there's a question about what that means and how that applies in its own terms and then how it applies as a result of the way in which the matter proceeded in the High Court and the Court of Appeal. But before I come to that, can I go back to first principles and just address for a moment the types of consent clauses that the cases have dealt with because the ones that my friend has dealt with, the lease cases, are ones that involve general consent clauses and in my submission there are three types of consent clause. There's the general clause which is, which has no constraint on scope. So for instance transfer is prohibited without consent and there's either an express contractual or a statutory implied term that consent is not to be unreasonably withheld and *Lovelock* and *Bromley Park* are examples of that. the second is a general but constrained scope clause which is similar to the first but it constrains the scope of considerations that the consenting party can take into account in exercising the right to withhold. For instance in relation to

creditworthiness or the type of use and examples of that are the *WEL Energy* case where it was creditworthiness, the *Louis Vuitton* case which is referred to in that passage of authority, the list of authorities the Court of Appeal referred to. It's a judgment from Winkelmann J in the High Court.

The third type of clause is a specialised consent clause. It confers a right to transfer subject to a condition precedent, that is to say that certain criteria are met. And here the clause is of the latter kind. The transferor or the intending transferor has the right to transfer if it discharges the condition precedent. The condition facing this case was that Swift establish that the intended transferee had sufficient financial capability. Now it's true that on the face of the clause, as one reads it, it has elements of both forms of clause, the general and the specific. Because there are two stages of enquiry when one looks at the clause. The first is, has Swift established sufficient financial capability on the part of the intended transferee and secondly if so, does GXL still have reasonable grounds to refuse consent? But GXL conceded in the High Court and the Court of Appeal that there was no second stage. That the only enquiry was the first stage. Had Swift established sufficient financial capability. And if sufficient financial capability had been established, then consent had to be granted. And that concession, as my friend confirmed this morning, was accepted by the Greymouth companies and by Swift.

WILSON J:

Mr Kos, I have difficulty in seeing how that can be characterised as a concession, given arguably there is a dual requirement in the clause.

MR KOS QC:

But if a party to a contract which has a right waives that right, which it has here, the right to refuse, on any other grounds or on grounds related, and simply confines it to a specific objective inquiry, then that's a waiver it can make. It doesn't prejudice the applicants in this case because that was a right that was vested in GXL which GXL had waived. And if there had been prejudice in relation to it I am sure that the Greymouth wouldn't have accepted

the concession but they did. And the fact that they put it quite explicitly in the –

BLANCHARD J:

So you're waiving the word, "unreasonably"?

MR KOS QC:

Yes. In fact the way it works is that those words in the clause that read, "Not to be unreasonably withheld," end up, because of the concession being read as, "Be granted". Shall be granted –

BLANCHARD J:

Or shall not be withheld.

MR KOS QC:

Or shall not be withheld, yes. That's right, effectively the word, "unreasonably" disappears. And so that concession was made and accepted. And I was about to say that in the Court of Appeal, additional submissions were called for by the Court in relation to a specific question and the submissions filed by Greymouth expressly said, that Greymouth and it's understood Swift accept the concessions and they proceeded accordingly. So there's no question of concession was accepted. But the fact that there is no second stage, no inquiry about whether GXL has reasonable grounds to refuse, doesn't mean that the first stage goes out. In other words, the first stage, it has Swift establish sufficient financial capability, that inquiry still has to be completed and that is the inquiry that the trial Judge will have to deal with.

So in my submission there are two entirely false premises underlying the present application. The first false premise is that an issue of reasonableness of refusal is raised at all. If reasonableness of refusal was still part of the inquiry before the Court, then under the general consent clauses you do have a different two-stage inquiry as to what was the reason for refusal and was it reasonable. And so in that context GXL's reasons might be examined, but that doesn't form part of the case as it was left after the acceptance, the

making of the acceptance of the concession. The only question in this case now is a factual question as to whether the proposed assignor, Swift, has established on an objective basis, sufficient financial capability and the proposed assignee, we say at the time of seeking consent. There is an argument, one legal argument left, which is not one that concerns this Court, as to the timing at which you make that assessment.

BLANCHARD J:

So you're saying that because you have already conceded and it's – the concession's been accepted, that no question of reasonableness arises, there can't be any question of general principle because the case has been confined to one of fact?

MR KOS QC:

Entirely, entirely. And you're also, sir, dealing with a clause that by its own nature, and as a result of its, effectively reformation by the concession, can't be said to be one of general commercial importance. This was not the case in which one deals with the question of whether collateral purposes or motives are relevant.

WILSON J:

Mr Kos, I'm sorry I'm still been very slow in getting the significance of the concession because it seems to me that assuming financial capability, wouldn't it be for Greymouth to waive any allegation of no reasonable basis for withholding rather than GXL?

MR KOS QC:

No because the establishing of the existence or the, yes the existence of sufficient financial capability is a condition of precedent. In other words it must be established by Swift.

WILSON J:

Yes, so assuming that?

MR KOS QC:

That's right. Well then the question, the question then would be whether there was, in addition to that, any other reason or any related reason on which GXL had still got reasonable grounds to refuse. But GXL has said and it's been accepted that it doesn't retain that right for the purpose of these proceedings. It's waived that right. The right to refuse on reasonable grounds, so the only inquiry becomes the first.

McGRATH J:

It's not open to GXL to change its position, you would accept, would you?

MR KOS QC:

Sorry Sir?

McGRATH J:

You're saying it's not open to you to change your position?

MR KOS QC:

Well it's not open to us to change our position now. That concession was made, it's been relied on.

McGRATH J:

So that –

MR KOS QC:

Concession was made and it has been relied on.

McGRATH J:

Yes I just sort of think, we're still in the pleading stages of a – I'm just really wondering if we can anticipate what might happen downstream.

MR KOS QC:

Well as the pleadings come at the hour, that's certainly the position. And as this case is before the Court I think, in those circumstances.

WILSON J:

But for this concession, would it have been open to Greymouth to allege a collateral purpose?

MR KOS QC:

If there was still a right to refuse beyond the first inquiry, yes.

WILSON J:

Well what now stops Greymouth alleging a collateral purpose?

MR KOS QC:

Because whether there was reasonableness of refusal or not isn't the point, because the only inquiry is the first inquiry not the second and that is simply whether objectively, that sufficient financial capability has been established. The other false premise, I said there were two. The other false premise in my submission, is the Court of – appears in my friend's submission at paragraph 33, that the Court of Appeal's judgment has required a purely objective approach. In my submission the Court of Appeal has done no such thing, it's simply the consequence of the clause, the fact that it is a specific clause, has two parts and the concession of the second part does not apply. So in my submission, all that is left for trial is a factual inquiry as to whether the condition, as to establishing sufficient capability had or had not been satisfied. It is not a case about common commercial contracts containing a general consent clause, it's not a case about a specific clause still preserving a right of refusal on reasonable grounds. The result is a unique commercial arrangement in the terms this Court put in the *Shell (Petroleum Mining) Company Limited v Todd Petroleum Mining Company Limited* NZSC 26 case in 2008. I have submissions to make on substantial miscarriage of justice but I apprehend I don't need to make them so those are my submissions if the Court pleases.

BLANCHARD J:

Yes thank you Mr Kos. Mr O'Brien?

MR O'BRIEN:

If Your Honours please. Much obviously turns on the concession, I was looking to see how it was described in the Court of Appeal judgment, but the concession in the Court of Appeal in the written submission, if I might read it to you, and of course I'm happy to supply a copy of these written submissions to the Court later, but the concession reads thus, "Greymouth accepts GXL's proposition –"

BLANCHARD J:

Are we going to take this down?

MR O'BRIEN:

Well Sir I –

BLANCHARD J:

Is it very lengthy?

MR O'BRIEN:

It's four lines Sir.

BLANCHARD J:

Well perhaps we better write it down. Just go slowly.

MR O'BRIEN:

I will, thank you Sir. It is paragraph 11 – sorry, 1.11, and it says, "Greymouth accepts GXL's proposition that clause 7.2(a) of the royalty deed is not a general consent provision allowing GXL to decline consent for any reasonable reason and that the reason it must be related to the question of the transferee's financial capability." And I don't know if Your Honours want to take this down because I can get it to you but it goes on to say, "But this cannot preclude enquiry into the reason for refusal. Was the stated reason the actual reason? What aspect of financial capability was seen as unacceptable and was reasonable or was the actual reason unrelated to financial capability i.e. collateral and unreasonable on that basis." So in my

submission the acceptance, or the case – the case has been put in several different ways in the High Court and the Court of Appeal and now today. The concession was, the key concession on behalf of GXL in the Court of Appeal as I recall it, and as my submission reflects and I don't have GXL's submission, was simply that it's not a general consent provision and that reasons for refusal had to be confined to the financial. Now we accepted that, nothing more and certainly not a waiver of the requirement for reasonableness because we have always seen that as a constraining influence on what GXL can do, that's why –

BLANCHARD J:

But reasonableness related to the financial capability?

MR O'BRIEN:

Well that and required them to have no other reason in mind –

BLANCHARD J:

Yes, yes.

MR O'BRIEN:

And in particular no collateral reason.

BLANCHARD J:

Yes.

MR O'BRIEN:

The key part of the case, very important because it's on that basis that the transfer has been affected. Ah well –

BLANCHARD J:

Yes you don't need to bring in reasonableness in that latter respect however it's simply a question of whether the reason was related to the financial capability.

MR O'BRIEN:

Yes.

BLANCHARD J:

Certainly if that was the formal acceptance of the so called concession it would appear to be so open to you to argue or to explore the question of collateral purpose.

MR O'BRIEN:

Well that Your Honour is my submission certainly.

WILSON J:

That's the point that was troubling me in terms of Mr Kos' submission.

MR O'BRIEN:

Yes. Well it's not, the concession is not quite what it said – it started as a concession that's actually an acceptance but what was accepted is that.

WILSON J:

It might be useful to get copies I think of the documents if you could.

BLANCHARD J:

I think we will need this in writing but by all means read it to us.

MR O'BRIEN:

The concession Sir is at paragraph 2.25 of the principal submissions. "The phrase does not allow GXL to refuse consent in circumstances where it has been established that Greymouth has sufficient financial capability on other unrelated or and/or subjective grounds." So the concession is the removal of the second element of the requirement of the clause. First, Swift to establish sufficient financial capability and then it follows that the clause, from GXL's perspective, to be read as I indicated in exchange with Justice Blanchard before, one reads the words as "shall not be withheld." You'll need to see all the submissions I think, including the supplementary submissions.

BLANCHARD J:

Yes.

MR O'BRIEN:

There is nothing I can add to that Sir except to say that memories suggest there may have been other ways in which it was phrased in the submission. I can't recall exactly but clearly we need to look at those documents if that's a pivotal point. Thank you Your Honours.

BLANCHARD J:

Thank you. Can we have those supplied to us by Monday please and we'll then give you a decision I was going to say fairly swiftly but I wouldn't want to indicate any bias in the use of that expression. Thank you very much.

COURT ADJOURNS: 11.07 AM